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# HAS THE SUPREME COURT CONFESSED ERROR ON THE ELEVENTH AMENDMENT? REVISIONIST SCHOLARSHIP AND STATE IMMUNITY

GEORGE D. BROWN\*

*The simple text of the eleventh amendment belies the complexity of the jurisprudence surrounding it. Professor George D. Brown uses the United States Supreme Court's recent decision in Pennsylvania v. Union Gas Co. as a jumping-off point to determine where the Court stands today on the delicate balance between national supremacy and state sovereignty. In the divided Court's endorsement of congressional power to abrogate the states' immunity he detects a shift toward national supremacy. Professor Brown finds abrogation theory to be as problematic as what came before it. Nevertheless, he accepts the current framework as a compromise that protects state treasuries on the one hand, while advancing enforcement of federal substantive norms on the other. The compromise is a shaky one, and Professor Brown expects the Court to continue wrestling with the doctrinal difficulties surrounding the eleventh amendment.*

## I. INTRODUCTION

"Better to overrule *Hans*, I should think, than to perpetuate the complexities that it creates, . . . but eliminate all its benefits to the federal system."

Justice Antonin Scalia<sup>1</sup>

The thrust of most recent federal courts scholarship is that the Burger-Rehnquist Court is almost always wrong on just about everything. The Court's decisions on standing,<sup>2</sup> abstention in favor of state proceedings,<sup>3</sup> implied rights of action,<sup>4</sup> *Bivens* remedies,<sup>5</sup> and the eleventh amendment<sup>6</sup> all have been the subject of constant, often withering, academic criticism.<sup>7</sup> A classic example is

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1. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2299 (1989) (Scalia, J., concurring in part and dissenting in part).

2. *E.g.*, *Allen v. Wright*, 468 U.S. 737 (1984).

3. *E.g.*, *Juidice v. Vail*, 430 U.S. 327 (1977).

4. *E.g.*, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

5. *E.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983). Under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a person whose constitutional rights have been violated by a federal official may sue that official for damages even though there is no statute which authorizes such a remedy.

6. *E.g.*, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

7. *E.g.*, *Nichol, Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985) (criticizing standing decisions); *Redish, Abstention, Separation of Powers, and the Limits of*

the field of eleventh amendment law. In case after case the Court's conservative justices have mustered a majority to take this seemingly narrow provision—the amendment bars suits against states in federal courts by noncitizens and foreigners—and turn it into a formidable barrier to federal suits against states by their own citizens.<sup>8</sup> Most of these cases have generated bitter division within the Court itself. The dissents by liberal justices have loomed large in the literature.<sup>9</sup> In a duet of mutual appreciation, later dissents cite as authority articles praising the earlier ones.<sup>10</sup> In volume alone the criticism has reached such a level that the Court seemingly cannot ignore it.<sup>11</sup>

Some of the attacks follow two general themes of federal courts scholarship. The Court is seen as abandoning the constitutionally mandated role of the national judiciary in the vindication of national rights.<sup>12</sup> Worse yet, it does so in the name of federalism, even though everyone knows that state institutions cannot be trusted.<sup>13</sup> In the eleventh amendment context, however, the conservative majority is vulnerable on several particular counts as well. Its use of the amendment does not square with the constitutional text.<sup>14</sup> The frequent invocation of history to expand that text rests on shaky ground.<sup>15</sup> Eleventh amendment doc-

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the *Judicial Function*, 94 YALE L.J. 71 (1984) (criticizing abstention decisions); Steinman, *Backing off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984) (criticizing denials of damages for constitutional violations by federal officials). Major articles criticizing the Court's eleventh amendment decisions are: Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978) [hereinafter Field, Part II]; Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984). In this Article I have grouped all of these writings together under the heading of revisionist scholarship. Whatever differences may exist among them, these authors all contend that the decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), the source of modern eleventh amendment doctrine, is incorrect in result and/or rationale and must be reconsidered. For a discussion of *Hans*, see *infra* text accompanying notes 44-47.

8. *E.g.*, *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989) (barring monetary recovery against state in federal court under Bankruptcy Act); *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989) (barring reimbursement award against state in federal court under Education of the Handicapped Act); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (plurality opinion) (denying damages award against state in federal court under Jones Act); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (barring damages award against state in federal court under Rehabilitation Act); *Edelman v. Jordan*, 415 U.S. 651 (1974) (barring compensatory relief against state in federal court under Social Security Act; prospective injunctive relief upheld).

9. *E.g.*, Gibbons, *supra* note 7, at 1893 (Justice Brennan's interpretation of amendment only one consistent with language, history, and early interpretation).

10. *E.g.*, *Atascadero*, 473 U.S. at 258 n.11, 261 n.12, 265 n.15, 270 n.22, 277 n.26, 279 n.29, 284 n.35 (Brennan, J., dissenting) (citing Gibbons, *supra* note 7, as guide to history of amendment).

11. *See, e.g., id.* at 302 (Brennan, J., dissenting).

12. *E.g.*, Amar, *supra* note 7, at 1504-06.

13. *E.g., id.* at 1477-79, 1483.

14. *E.g.*, Marshall, *supra* note 7, at 1346-47.

15. *E.g., id.* at 1349-71.

trine perpetuates discredited notions of sovereign immunity.<sup>16</sup> Finally, the eleventh amendment cases have generated a highly complex body of technical doctrines whose inconsistencies invite easy derision as "a hodgepodge of confusing and intellectually indefensible judge-made law."<sup>17</sup>

The main target of this extensive literature is the 1890 decision of *Hans v. Louisiana*<sup>18</sup> and the current Court's insistence that *Hans* should be followed and, indeed, expanded.<sup>19</sup> *Hans* was a suit in federal court by a citizen against his own state. The Court held that although the amendment on its face bars only suits by noncitizens and foreigners, the spirit and history of the amendment reflect a broader, fundamental hostility to suits against states in federal court by anyone.<sup>20</sup> The critics would overrule *Hans*, and every case that applied it.<sup>21</sup>

This Article examines whether the Court has, even if indirectly, accepted the revisionist view. The particular focus is on the Court's current position that Congress can "abrogate" the states' eleventh amendment shield.<sup>22</sup> The cases hold that citizens can sue their states in federal court if Congress has passed a statute that explicitly authorizes the particular suit. This position poses serious doctrinal problems. On the one hand, to put the matter this way indicates that there is something to abrogate. Indeed, the Court has insisted that recognizing some degree of congressional power is consistent with *Hans* and the constitutional principle that it establishes.<sup>23</sup> On the other hand, if the amendment gives to the states an immunity with a constitutional status, it is hard to see how a mere statute can take it away.<sup>24</sup> After considering the Court's attempts to resolve this dilemma, the Article considers the alternative approach of treating state immunity as less than constitutional in status, a kind of "constitutional common law" perhaps. The Court may well recast the eleventh amendment debate in subconstitutional terms.<sup>25</sup> To do so would clarify a number of perplexing issues. It would also, however, recognize the substantial inroads of abrogation theory upon the core principles of *Hans*. The Court has so far resisted doing this, perhaps feeling that *Hans* and abrogation can coexist peacefully.

Accepting the concept of congressional abrogation of the eleventh amendment, regardless of whether state immunity is of constitutional status, raises in

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16. *E.g.*, Shapiro, *supra* note 7, at 71-76.

17. Gibbons, *supra* note 7, at 1891; *see also* Amar, *supra* note 7, at 1480 ("in law, as in logic, anything can be derived from a contradiction"); Fletcher, *supra* note 7, at 1044 (eleventh amendment jurisprudence has become a "complicated, jerry-built system that is fully understood only by those who specialize in this difficult field").

18. 134 U.S. 1 (1890).

19. *E.g.*, Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 486-87 (1987) (plurality opinion).

20. *Hans*, 134 U.S. at 12-19.

21. *See infra* text accompanying notes 36-75.

22. *See e.g.*, Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (plurality opinion); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

23. *Fitzpatrick*, 427 U.S. at 456 (Congress may abrogate under fourteenth amendment because that provision limits the eleventh amendment. Citizen suits against states would be "constitutionally impermissible in other contexts.").

24. *See Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring).

25. *See infra* text accompanying notes 157-78.

turn questions of limits on Congress' ability to do so. The Article next considers whether there ought to be limits and whether their existence depends on which of its powers Congress has used and/or on the degree of clarity with which it has spoken. As to the first issue, the question has been whether Congress can abrogate only when legislating pursuant to the fourteenth amendment, or whether it can do so in the exercise of any of its article I powers. The Article argues that the recent decision in *Pennsylvania v. Union Gas Co.*<sup>26</sup> does not provide a definitive answer. While that case holds that Congress may utilize the commerce power to abrogate, the issue still must be viewed as open. As for the question of clear statement requirements, that is even more of a battleground. It was at issue in five cases decided last term alone.<sup>27</sup> This Article's concern is primarily with where the Court derives the authority to impose clear statement rules. One must consider whether the Court has erected requirements of clear statement of congressional intent to abrogate that are inconsistent with its concession that Congress has the power to do so.

That the search for limits looks very much like trying to have things both ways raises a final question: who wins under abrogation analysis? The view advanced here is that abrogation analysis represents a strong tilt toward the supremacy of national power over concern for state sovereignty.<sup>28</sup> It is thus consistent with one of the main themes of revisionist scholarship.<sup>29</sup> It is true that the states have something until Congress takes it away, but Congress must always take some action before a federal court can hear a case. No federal suit of any kind is possible unless a congressional statute has provided federal jurisdiction over the matter, and, in most cases, provided a right of action as well. Thus the significant point is not that Congress must act, but that it can act to take away the eleventh amendment shield.

Justice Brennan was the author of the plurality opinion in *Union Gas*. The decision upholds an abrogation under the commerce power.<sup>30</sup> For Justice Scalia, permitting abrogation under an article I power was a de facto overruling of *Hans*.<sup>31</sup> Yet Justice Brennan purported to achieve this result while keeping the *Hans* structure intact.<sup>32</sup> As noted, the eleventh amendment generates an attempt to have things both ways. In *Union Gas* five justices opted for process limits only: requirements of clear statement.<sup>33</sup> Four of these justices, however,

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26. 109 S. Ct. 2273 (1989).

27. *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989); *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989); *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989); *Union Gas*, 109 S. Ct. 2273 (1989). *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989), involved the construction of 42 U.S.C. § 1983 (1982). However, the Court used an eleventh amendment analysis to reach a narrow construction. *Will*, 109 S. Ct. at 2308-09; see *id.* at 2314 (Brennan, J., dissenting) (criticizing Court for utilizing methodology "unique to cases involving the Eleventh Amendment").

28. See Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 Geo. L.J. 363, 393-94 (1985) (predicting Court would back down in favor of national power).

29. Marshall, *supra* note 7, at 1352-53.

30. *Union Gas*, 109 S. Ct. at 2280-86 (plurality opinion).

31. *Id.* at 2299 (Scalia, J., concurring in part and dissenting in part).

32. *Id.* at 2277 (plurality opinion).

33. That the clear statement rule is the applicable limit and is satisfied is the position of the

really want to overrule *Hans* altogether.<sup>34</sup> Four other justices would have gone further in the direction of limits and accorded Congress power to abrogate under the fourteenth amendment but not under article I.<sup>35</sup> Balancing concerns of national supremacy with concerns of state sovereignty can never be done to the satisfaction of both sides. Abrogation analysis is an attempt at compromise. The Court still could move in either direction, but *Hans* emerges as seriously wounded.

## II. REVISIONISM REVISITED

At this point, a brief outline of the revisionist critique is in order. The views of the academic proponents of abrogation theory will also be considered in an effort to determine whether their position is simply one strain of revisionism or a different way of looking at the eleventh amendment problem.

### A. Revisionist Themes

Revisionists start with the text.<sup>36</sup> The eleventh amendment was adopted in response to *Chisholm v. Georgia*.<sup>37</sup> *Chisholm* held that a contract suit against a state by a citizen of another state was properly brought in federal court.<sup>38</sup> The Court found the case squarely within article III because that article extends the judicial power to suits "between a State and Citizens of another State . . ."<sup>39</sup> The amendment that was adopted five years after *Chisholm* provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State."<sup>40</sup>

The amendment thus seems squarely directed at *Chisholm*-type suits (and those by foreigners). Moreover, it "amends" the very constitutional language, more precisely the Court's construction of the language, that permitted the result in *Chisholm*. For the revisionists this is an open and shut case: the amend-

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plurality opinion of Justices Brennan, Marshall, Blackmun and Stevens. *Union Gas*, 109 S. Ct. at 2277-80 (plurality opinion). The latter's separate concurring opinion, however, does express doubts about eleventh amendment doctrine in general. *Id.* at 2286-89 (Stevens, J., concurring). Justice White provided the fifth vote for the proposition that Congress had power to abrogate and that the clear statement rule was thus applicable. *Id.* at 2295 (White, J., concurring in the judgment). He did not find the clear statement rule met, however. *Id.* at 2289-94 (White, J., concurring in the judgment). The fifth vote for this proposition was Justice Scalia's. *Id.* at 2295-96 (Scalia, J., concurring in part and dissenting in part). He, however, would have denied Congress the power to abrogate, as would Chief Justice Rehnquist and Justices O'Connor and Kennedy. *Id.* at 2296-2303 (Scalia, J., concurring in part and dissenting in part). For a discussion of *Union Gas*, see *infra* text accompanying notes 134-52.

34. In *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989), Justices Brennan, Marshall, Blackmun, and Stevens repeated their view that *Hans* should be overruled. *Id.* at 2403 (Brennan, J., dissenting).

35. *Union Gas*, 109 S. Ct. at 2302 (Scalia, J., concurring in part and dissenting in part). Justice Scalia was joined on this point by Chief Justice Rehnquist and Justices O'Connor and Kennedy.

36. *E.g.*, Marshall, *supra* note 7, at 1342-43.

37. 2 U.S. (2 Dall.) 419 (1793).

38. The case was brought in the Supreme Court under its original jurisdiction.

39. U.S. CONST. art. III, § 2.

40. U.S. CONST. amend. XI.

ment means only what it says.<sup>41</sup> Most importantly, the amendment says nothing about suits by citizens against their own states. Such suits would have to be brought under federal question jurisdiction.<sup>42</sup> The amendment does not speak to federal question jurisdiction. Thus, citizen suits remain within the judicial power.<sup>43</sup>

*Hans* went beyond literalism to bar a citizen's suit against his own state. The Court found in the amendment a broad policy against suing states in federal court. The states never would have ratified the amendment, the Court reasoned, if it were understood to permit citizen suits against them.<sup>44</sup> Moreover, the original Constitution was drafted and ratified at a time when general understandings of sovereign immunity would have barred federal court suits against nonconsenting states.<sup>45</sup> The current Court has emphasized the historical correctness of *Hans* in perpetuating and extending that case. The conservative majority has relied in part on the fact that supporters of the original Constitution disclaimed any notions that states could be sued in federal court.<sup>46</sup> It also has relied on the swiftness with which the eleventh amendment was adopted, a product of the "shock" that supposedly greeted *Chisholm*, as grounds for a broad construction emphasizing the amendment's spirit.<sup>47</sup>

It is precisely on the field of history that the revisionists have waged their most extensive battle against *Hans* and the current Court.<sup>48</sup> As a starting point, they perhaps need only to demonstrate that the historical record is uncertain. If so, the plain language of the amendment ought to prevail given the impossibility of knowing the relevant intent.<sup>49</sup> However, the revisionists go further. History demonstrates that there was no background understanding that state sovereign immunity was part of the Constitution. Indeed, "the majority of those who commented on the issue concluded that the Constitution did subject states to suits in federal courts."<sup>50</sup> *Chisholm* was correct in finding jurisdiction. Because it was a state law case, however, the Court should have recognized a common-law defense of sovereign immunity.<sup>51</sup>

As for the eleventh amendment, it was designed to overturn the result in *Chisholm*, not to enshrine any general concept of state sovereign immunity.

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41. *E.g.*, Amar, *supra* note 7, at 1475; Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 608-10 (1989).

42. 28 U.S.C. § 1331 (1982).

43. There is, however, a dispute among revisionists over whether a noncitizen should be able to bring a federal question suit against a state in federal court. *See* Shreve, *supra* note 41, at 610-11. This nontextual approach weakens the general revisionist case. *See* Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1380 (1989).

44. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

45. *Id.* at 12-19.

46. *E.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985).

47. *See* *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 485 n.17 (1987) (plurality opinion).

48. The most detailed treatment in the law review articles of the historical points is that of Judge Gibbons, *supra* note 7.

49. Marshall, *supra* note 7, at 1349-51.

50. *Id.* at 1350.

51. Amar, *supra* note 7, at 1467-73.

Suits by out-of-staters were those most in the public mind and those that the states feared most.<sup>52</sup> There existed at least one proposal for blanket immunity; it was not adopted by Congress.<sup>53</sup> The possibility of federal question suits against states, at least by their own citizens, was not part of the debate. Congress had not conferred general federal question jurisdiction.<sup>54</sup> The amendment is not even directed at this issue.<sup>55</sup> Thus the revisionists confront the Court on what seems to be its strongest ground, and an essential one as well, if the language of the amendment does not control. The validity of this critique is widely accepted, at least in academic circles.<sup>56</sup>

Whether one accepts the revisionists' critique, they certainly have raised substantial doubts about the soundness of *Hans* and its progeny. These doubts are reinforced by post-*Hans* eleventh amendment doctrine, which is complex, confusing, and often inconsistent.<sup>57</sup> The Court has felt compelled to recognize some need for national supremacy. Thus suits by the United States against states may be brought in federal court despite the amendment's supposed policy against making states defend themselves in that forum.<sup>58</sup> Particularly vexatious are the rules about suing a state officer. *Ex parte Young*<sup>59</sup> held that such suits could be brought if the officer was alleged to be acting in violation of the federal Constitution. This violation would "strip" him of his state authority, although he still would be acting under color of state law.<sup>60</sup> Subsequent cases have admitted that *Young* is a fiction and have narrowed its rule to cases in which the state is the real party in interest but the plaintiff seeks only prospective injunctive relief.<sup>61</sup> Prospective claims against the officer based on state law cannot be appended, even though the initial suit is valid under *Young* and the requirements of pendent jurisdiction are met.<sup>62</sup> All of these "doctrinal gymnastics and legal fictions,"<sup>63</sup> in the words of one critic, demonstrate for the revisionists the folly of proceeding from incorrect constitutional premises. One view is that the results are simply wrong, that the states get too much immunity.<sup>64</sup> Another view emphasizes the danger of the judiciary's undermining its own legitimacy by "formal

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52. Marshall, *supra* note 7, at 1353-71.

53. Amar, *supra* note 7, at 1481; Jackson, *supra* note 7, at 46. Under the amendment process, Congress had to agree on the constitutional language to overturn *Chisholm* before any proposal could be put to the states. See U.S. CONST. art. V.

54. See C. WRIGHT, LAW OF FEDERAL COURTS 90 (4th ed. 1983).

55. See Fletcher, *supra* note 7, at 1077-78.

56. See Jackson, *supra* note 7, at 4-5, 44 n.179.

57. Professor William Marshall describes the world of eleventh amendment jurisprudence as "relentlessly ambiguous." Marshall, *supra* note 43, at 1372-73 n.5.

58. *E.g.*, United States v. Mississippi, 380 U.S. 128 (1965).

59. 209 U.S. 123 (1908).

60. *Id.* at 159.

61. *E.g.*, Edelman v. Jordan, 415 U.S. 651 (1974). The Court in *Edelman* admitted that the line between prospective and retrospective relief is not always clear. *Id.* at 667. It is also true that prospective relief can have a substantial effect on state treasuries, just as damages would. *Id.* at 667-68.

62. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

63. Amar, *supra* note 7, at 1478.

64. Professor Amar's article is a strong statement of this view. See Amar, *supra* note 7, at 1483-84.



adherence to a doctrine riddled with exceptions designed to counterbalance its evils."<sup>65</sup> All agree that the only way out of the present morass is to overrule *Hans* and begin again.<sup>66</sup>

Text, history, and the vagaries of post-*Hans* policy are the main revisionist themes, but they are not the only ones. One critique is structural: any recognition of state immunity from suit in federal court thwarts the constitutional goal of "coextensiveness of judicial and legislative power."<sup>67</sup> It makes no sense to say that Congress has broad reach in regulating state governments, as it surely does after *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>68</sup> but that the federal courts are not equally available to enforce those regulations. Perhaps more fundamental is the critique that the Court's current position perpetuates notions of sovereign immunity, a doctrine which is increasingly discredited<sup>69</sup> and at variance with the American concept of popular sovereignty.<sup>70</sup> On another level, it has been argued that the Court's denial of federal trial court jurisdiction over claims against states by their citizens is wholly at odds with its own assertion of jurisdiction over appeals from such cases decided in state courts.<sup>71</sup> Finally, the eleventh amendment's denial of federal jurisdiction can be seen as a kind of abstention under the doctrine of *Younger v. Harris*,<sup>72</sup> which relegates the plaintiff to state forums for an initial decision.<sup>73</sup> Yet unlike *Younger* cases, there is no analysis of how well these forums will handle federal issues<sup>74</sup> and little analysis of whether they will hear them at all.<sup>75</sup>

Revisionist scholarship is by no means monolithic. There is sharp disagreement over whether the eleventh amendment prohibits federal question suits by noncitizens or whether it merely abolishes the jurisdiction over noncitizen state

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65. Jackson, *supra* note 7, at 7.

66. *Id.* at 17-18 & n.79; Shreve, *supra* note 41, at 608-15.

67. Amar, *supra* note 7, at 1483.

68. 469 U.S. 528 (1985). In *Garcia* the Court held that there are no state sovereignty limits on congressional action that regulates the states. The only enforceable constitutional limit is whether Congress has acted within the scope of its powers. Legislation affecting the wages of public-sector employees was clearly within the commerce power. *Id.* at 537-47, 555-56.

69. See, e.g., Shapiro, *supra* note 7, at 61-62.

70. Amar, *supra* note 7, at 1466-81.

71. This is the principal tenet of the article by Profesor Jackson, *supra* note 7. For agreement with Jackson's thesis, see *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2288 n.3 (1989) (Stevens, J., concurring).

72. 401 U.S. 37 (1971).

73. Under the *Younger* doctrine a federal court will not hear a federal question case if the plaintiff is a party in pending state proceedings raising the same issue, if there is an important state interest in the proceedings, and if he has a full and fair opportunity to raise the federal issues in the state forum. The plaintiff's only federal judicial recourse is the possibility of an appeal to the Supreme Court from a final state disposition. *Younger* dismissals thus have the same practical effect as eleventh amendment dismissals. *Id.* at 43-54.

74. E.g., *Juidice v. Vail*, 430 U.S. 327, 337 n.14 (1977) (discussing state procedures which would have permitted raising federal issues). In recent *Younger* cases the Court appears to have moved toward a presumption that state procedures are adequate. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) ("[A] federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.").

75. See Amar, *supra* note 7, at 1477-78 n.209 & n.211. Compare *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-40 n.2 (1985) (suggesting state obligation to hear federal claims) with *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 488 (1987) (plurality opinion) (listing plaintiffs' remedies, but omitting federal law suit against state in state court).

law suits that article III originally granted.<sup>76</sup> There is even disagreement over whether the result in *Hans* is entirely bad, or whether something like it might be reached as a matter of tenth amendment state sovereignty, article III judicial power, or federal common law.<sup>77</sup> What is not in dispute among the large body of commentators grouped together in this Article under the "revisionist" heading is that the rationale of *Hans*—that the states' shield from federal suit is of constitutional stature and derived, at least in part, from the eleventh amendment—has to go.

*B. Abrogation Theory—A Tenable Middle Ground?*

At this point it is necessary to examine another branch of recent eleventh amendment scholarship: the argument that the amendment is directed at the federal courts rather than at Congress, and that it imposes few, if any, limits on the latter body. Is abrogation theory simply revisionism by another name, or is it a doctrinally defensible middle ground between *Hans* and its critics? The answer to this question should help us understand the Court's current approach to the eleventh amendment, since the Court appears to have accepted abrogation theory as its starting point.

The principal proponents of an abrogationist reading of the amendment are Professors Nowak and Tribe.<sup>78</sup> They argue that both its history and text support treating Congress differently from the federal courts. The amendment is seen as inspired by distrust of the latter.<sup>79</sup> The language is directed at the courts;<sup>80</sup> it is they who construe the judicial power. This approach makes sense because the amendment is concerned with state interests that are represented and protected in Congress but not in the federal judiciary.<sup>81</sup> Giving states participation in the burdens they will bear is "the central tenet" of the amendment.<sup>82</sup> The upshot of this analysis is that Congress has power to remove jurisdictional limits otherwise flowing from the amendment. It may do so under any of its powers,<sup>83</sup> although principles of clear statement do constrain it somewhat. These requirements ensure that state interests have been taken into account.<sup>84</sup>

An initial question is whether the abrogationist critique is one more strand of revisionism. It certainly reflects a principal theme of revisionism: that no-

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76. See Marshall, *supra* note 7, at 1346-49 (discussing competing views).

77. See Jackson, *supra* note 7, at 72-104 (federal common law); Massey, *supra* note 7 (tenth amendment state sovereignty); Shreve, *supra* note 41, at 612-15 (article III).

78. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 HARV. L. REV. 682 (1976). In this Article I have cited the Tribe treatise for his most recent views. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

79. *E.g.*, Nowak, *supra* note 78, at 1430.

80. *E.g.*, L. TRIBE, *supra* note 78, at 186.

81. See *id.*

82. Nowak, *supra* note 78, at 1449.

83. L. TRIBE, *supra* note 78, at 185-86.

84. *Id.* at 186-87.

tions of national supremacy ultimately must prevail over notions of state sovereignty.<sup>85</sup> On the other hand, neither Nowak nor Tribe appears to question the correctness of *Hans*, although Tribe does say it is time to reexamine the entire area of eleventh amendment doctrine.<sup>86</sup> The whole notion of abrogation seems to rest on the premise that there is something to abrogate—that the eleventh amendment does provide some sort of shield for states against the federal judicial power.<sup>87</sup> Both Tribe and Nowak make much of a supposed distinction between rights conferred against Congress and rights conferred against the federal judiciary. Even so, to suggest that states have significant rights runs counter to one major thrust of revisionist scholarship: that the amendment is limited in scope, affecting only suits by noncitizens and foreigners.

Whether one is a revisionist or not, it must be admitted that the Nowak-Tribe thesis has several fundamental weaknesses. The amendment's text does not support their distinction.<sup>88</sup> It says that "the judicial power" does not extend to certain suits.<sup>89</sup> If, post-*Hans*, those suits include federal actions by in-staters they are not within the judicial power.<sup>90</sup> The amendment speaks to everyone. Trying to derive support from "shall not be construed" is futile.<sup>91</sup> Why those words were inserted is not clear.<sup>92</sup> Moreover, if Congress passes a jurisdictional statute embracing suits against states the courts must "construe" the words as permitting this.<sup>93</sup> A major premise of the Nowak-Tribe argument is that Congress is the national institution most likely to show concern for the states and to protect them.<sup>94</sup> The notion that Congress represents state interests may well be wrong, given the focus on the national nature of the congressman's job as legislator.<sup>95</sup>

Another problem is that Nowak and Tribe suggest that there is something special about congressional action to confer jurisdiction in contrast with some prior, self-executing stage of the federal judicial power. The eleventh amendment imposes limits at this stage, but that immunity disappears when Congress takes the next step of conferring jurisdiction.<sup>96</sup> The federal courts have no jurisdiction until Congress confers it.<sup>97</sup> That is the first step, and when taking it Congress is constrained by the limits of article III. The argument, familiar since

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85. Marshall, *supra* note 7, at 1352-53.

86. L. TRIBE, *supra* note 78, at 195.

87. See Jackson, *supra* note 7, at 45 n.180 (distinguishing Nowak and Tribe from revisionist writers).

88. See *id.* at 42.

89. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI (emphasis added).

90. See, e.g., Marshall, *supra* note 7, at 1348.

91. "The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI (emphasis added).

92. See Marshall, *supra* note 7, at 1348 n.26.

93. *Id.*

94. See, e.g., L. TRIBE, *supra* note 78, at 186.

95. See Brown, *supra* note 28, at 375.

96. See, e.g., L. TRIBE, *supra* note 78, at 185; Nowak, *supra* note 78, at 1422.

97. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

*Marbury v. Madison*,<sup>98</sup> applies here: Congress cannot expand the jurisdiction of the federal courts by conferring anything that is outside of article III.<sup>99</sup>

The revisionists and the abrogationists arrive at more or less the same place: Congress can make the states amenable to federally based suits by citizens in federal courts. However, the revisionists get there by overruling *Hans*. They thus avoid the serious doctrinal problems discussed above. Moreover, they are not obliged to make the task any more difficult for Congress by imposing specific rules of clear statement. The abrogationists take a more twisting route. Their partial acceptance of *Hans*, and the requirement of special rules to lift state immunity, suggest that there may be something to be said for that case after all.

### III. REVISIONISM AND THE COURT—IN SEARCH OF AN ELUSIVE FIFTH VOTE

#### A. Pre-Union Gas—*The Old Majority and The Old Debate*

The conservative majority has never accepted the proposition that the volume of academic criticism creates a climate in which *Hans* should be reconsidered.<sup>100</sup> These justices have relied on history<sup>101</sup> (although admitting it may be ambiguous),<sup>102</sup> policy,<sup>103</sup> and the values of stare decisis<sup>104</sup> in adhering to *Hans*. Justice Brennan, on the other hand, has relied heavily on the revisionist writing.<sup>105</sup> He has invoked it to support his general proposition that the states have only a nonconstitutional immunity from federal suit that Congress may always remove because the states surrendered their sovereignty to it in the plan of the Constitution.<sup>106</sup> He also invokes the criticisms as grounds for reconsidering the whole matter.<sup>107</sup> Justice Brennan speaks for a block of four anti-*Hans* justices.<sup>108</sup>

This Article argues that the majority is correct. To say that the matter is controverted has the ring of a self-fulfilling prophecy when a principal source of the controversy is Justice Brennan's own dissents. On a more fundamental level, those critics who would allow federal lawsuits by noncitizens must engage in the

98. 5 U.S. (1 Cranch) 137 (1803).

99. See, e.g., Jackson, *supra* note 7, at 43.

100. E.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-39 n.2 (1985) ("'[N]ew evidence' . . . has been available . . . for almost two centuries.").

101. E.g., *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 479-85 (1987) (plurality opinion).

102. *Id.* at 482-84 (plurality opinion).

103. *Id.* at 486-88 (plurality opinion).

104. *Union Gas*, 109 S. Ct. at 2298 (Scalia, J., concurring in part and dissenting in part).

105. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258-59 (1985) (Brennan, J., dissenting) (Recent research shows Court's doctrine "has rested on a mistaken historical premise.").

106. For an early statement of his views, see *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting).

107. E.g., *Welch*, 483 U.S. at 521 (Brennan, J., dissenting).

108. Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2403 (1989) (Brennan, J., dissenting) (In action by father of child with learning disability under Education of the Handicapped Act, Court held statute did not abrogate Pennsylvania's immunity from suit.).

same extratextual analysis for which they criticize the Court.<sup>109</sup> As for history, the critics ignore the possibility that the eleventh amendment is an anti-federalist component of the Constitution and should be construed as such.<sup>110</sup> It is not surprising that the text is aimed at the types of suits with which the polity was most familiar.<sup>111</sup> If no one was thinking about federal suits,<sup>112</sup> their omission is not surprising either. Moreover, it strains credulity to describe the amendment as "a simple desire to effect a partial repeal of two technical diverse party grants."<sup>113</sup> The fundamental choice to amend the organic instrument is usually generated by something more profound than concern about the arcana of federal jurisdiction. To the extent that the constitutional plan requires some federal judicial enforcement of federal norms, the Court's own tempering of the amendment to permit a wide range of equitable relief may be a historically faithful balancing of the competing policies.<sup>114</sup> In this respect it is worth noting that several revisionists who criticize the reasoning in *Hans* concede that its result is consistent with constitutional values and might be reached via other rationales.<sup>115</sup>

What is puzzling about the majority, then, is not its defense of *Hans* but its failure to recognize the tension between abrogation theory and the *Hans* view of the eleventh amendment. In the principal abrogation case, *Fitzpatrick v. Bitzer*,<sup>116</sup> Justice Rehnquist did make it a point to distinguish abrogation under the fourteenth amendment from abrogation in the exercise of other powers. He treated the amendment as an explicit alteration of the preexisting federal-state balance.<sup>117</sup> Thus, Congress in enforcing it might "provide for private suits against States or state officials which are constitutionally impermissible in other contexts."<sup>118</sup>

This is certainly a defensible limitation.<sup>119</sup> The problem is that abrogation is not easily confined. Consider the spending power. If federal funds are tendered on the condition that a state waive its eleventh amendment immunity, this might be viewed as an unconstitutional condition, a de facto abrogation given the illusory nature of the choice.<sup>120</sup> In *Edelman v. Jordan*,<sup>121</sup> however, the Court made it clear that Congress could induce such a waiver. Of course, this

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109. See Marshall, *supra* note 43, at 1380.

110. Cf. *id.* at 1388 (eleventh amendment's overruling of *Chisholm* "implicitly rejects the 'plan of the Convention' theory of federal jurisdiction").

111. See Marshall, *supra* note 7, at 1356-71. It should be noted that Professor Marshall reads the amendment as barring only those suits it refers to specifically.

112. See Fletcher, *supra* note 7, at 1077-78.

113. Amar, *supra* note 7, at 1482.

114. See Marshall, *supra* note 43, at 1386-87 & n.88.

115. See *supra* note 77.

116. 427 U.S. 445 (1976).

117. *Id.* at 456.

118. *Id.*

119. See Brown, *supra* note 28, at 393.

120. This would be particularly true in the case of grant programs that are both large and basic, such as public welfare. See Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343, 396 (1985) (discussing issue of unconstitutional conditions).

121. 415 U.S. 651, 672 (1974).

matter is clouded by general spending power doctrine that treats states' participation in federal programs as always voluntary.<sup>122</sup>

The big question is Congress' power to abrogate in the exercise of its article I powers. The Court in *Fitzpatrick* suggested that is a different context, and described fourteenth amendment legislation as "grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty."<sup>123</sup> Yet the same could be said of any article I power. The grant of that power to Congress marks a "diminution" of state power in the area.<sup>124</sup> Because Congress can displace the states altogether, making them amenable to federal suit under article I-based norms hardly seems a greater invasion of sovereignty.

Before *Pennsylvania v. Union Gas Co.*,<sup>125</sup> decided in 1989, the decisions on article I abrogation were ambiguous at best. The general pattern had been to treat the eleventh amendment as conferring a form of constitutional protection upon the states, to declare, or assume for purposes of the case, that Congress can remove the protection, and then to find that Congress had not spoken with sufficient clarity to conclude that it intended to do so.<sup>126</sup> Thus, the Court had been finessing the ultimate question of how an article I statute could override a constitutional guarantee. It also was avoiding the question of how abrogation theory was consistent with *Hans*.

Apart from the question whether Congress had spoken clearly enough in a specific statute, the general debate within the Court was largely over *Hans* itself. Commentators saw signs of change in the 1987 decision in *Welch v. Texas Department of Highways and Public Transportation*,<sup>127</sup> an article I abrogation case.<sup>128</sup> Only four justices reasserted the validity of *Hans*.<sup>129</sup> There were the usual four dissents.<sup>130</sup> The ninth vote was Justice Scalia.<sup>131</sup> He found it unnecessary to reach the *Hans* question because Congress had enacted the statute in question at a time when *Hans* was understood as a correct statement of the law.<sup>132</sup> It is not clear whether he agreed that Congress had not spoken plainly enough to subject a state to private suit in federal court or whether he doubted it could do so under article I at all. It is hard to read his brief opinion as inspired by doubts about *Hans* itself. Academics, however, saw the stage as set for a

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122. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923).

123. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

124. See *Union Gas*, 109 S. Ct. at 2282 (plurality opinion) (discussing commerce clause as expansion of federal power and contraction of state power).

125. 109 S. Ct. 2273 (1989) (plurality opinion).

126. E.g., *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (plurality opinion); *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) (eleventh amendment bars suit against state in federal court by state employee suing under Fair Labor Standards Act).

127. 483 U.S. 468 (1987) (plurality opinion) (eleventh amendment bars suit against state in federal court by state employee suing under Jones Act).

128. See, e.g., Marshall, *supra* note 43, at 1374.

129. *Welch*, 483 U.S. at 486 (plurality opinion). The plurality consisted of Chief Justice Rehnquist, and Justices White, Powell and O'Connor.

130. Justice Brennan dissented, joined by Justices Marshall, Blackmun and Stevens. *Welch*, 483 U.S. at 521 (Brennan, J., dissenting).

131. *Id.* at 495 (Scalia, J., concurring).

132. *Id.* at 496 (Scalia, J., concurring).

reconsideration of *Hans* and saw *Union Gas* as the likely vehicle.<sup>133</sup> No such thing happened. *Union Gas* perpetuates the *Hans* framework but underscores the difficulties of fitting abrogation theory within that framework as well as the serious conceptual problems within abrogation theory itself.

*B. Union Gas—New Debate, Any Majority?*

The Reporter of Decisions' syllabus in *Union Gas* gives the reader a good sense of where the Court stands on eleventh amendment issues. The last paragraph provides as follows:

Brennan, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which Marshall, Blackmun, Stevens, and Scalia, JJ., joined, and an opinion with respect to Part III, in which Marshall, Blackmun, and Stevens, JJ., joined. Stevens, J., filed a concurring opinion. White, J., filed an opinion concurring in the judgment, in Part I of which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined. Scalia J., filed an opinion concurring in part and dissenting in part, in Parts II, III, and IV of which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined. O'Connor, J., filed a dissenting opinion.<sup>134</sup>

Clearly we have a divided Court, but that always has been the case. The question is whether the Court's views are in transition away from *Hans*.

At issue in *Union Gas* was the possible liability of a state in damages to a private party who had been sued by the federal government under the Superfund legislation.<sup>135</sup> When the private party sought to join the state as a third-party defendant, that portion of the suit presented the *Hans* questions directly. The initial question was whether the relevant statutory scheme clearly authorized suits against states. As in earlier cases, the Court split over this issue; five justices found that the clear statement test was met.<sup>136</sup> The original statute included states within the general definition of persons who could be sued.<sup>137</sup> However, eleventh amendment precedent made clear that such a general statement was not enough to authorize private damage actions.<sup>138</sup> The key provision was thus a 1986 amendment that excluded state liability in cases of involuntary assumption of control over facilities, but provided that

the exclusion provided under this paragraph shall not apply to any state or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a state or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both proce-

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133. *E.g.*, Shreve, *supra* note 41, at 601-02.

134. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2276 (1989).

135. 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986).

136. This was the plurality of Justices Brennan, Marshall, Blackmun, and Stevens, plus Justice Scalia.

137. 42 U.S.C. § 9607(a) (1982) (amended 1986).

138. *Union Gas*, 109 S. Ct. at 2291 (White, J., concurring in judgment) (discussing *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973)).

durally and substantively, as any nongovernmental entity . . . .<sup>139</sup>

Justice Scalia joined with the anti-*Hans* wing to provide five votes for the proposition that this language was dispositive as to congressional intent to make private parties liable.<sup>140</sup>

The debate then shifted to the question that the Court previously had avoided: whether Congress could abrogate state immunity in an enactment under the article I commerce power. On this point, a different majority emerged to hold that it could. Justice Brennan, writing for the group of four justices who had opposed *Hans*, purported to apply *Hans*.<sup>141</sup> He did so in ways that make one wonder whether anything is left of that case. He described the eleventh amendment as conferring immunity on states, but found in prior cases clear authority for Congress to abrogate that immunity under any of its powers. *Fitzpatrick* was the only direct support.<sup>142</sup> For Justice Brennan, the important point was not that *Fitzpatrick* involved the fourteenth amendment, but that it involved a grant of power to Congress, thus taking something away from the states.<sup>143</sup> He treated all grants of power to Congress as plenary, refusing to treat the fourteenth amendment as somehow "ultraplenary."<sup>144</sup>

What is striking about the Brennan opinion is the ease with which he engrafted onto the *Hans* framework his own prior views about state immunity. Perhaps the Constitution was passed against a background of state immunity, and perhaps *Hans* was right in holding that "the principle of sovereign immunity reflected in the Eleventh Amendment rendered the States immune from suits for monetary damages in federal court even where jurisdiction was premised on the presence of a federal question."<sup>145</sup> The point is that the states waived whatever they had been given by surrendering it in the constitutional plan of grants of power to Congress.<sup>146</sup> The validity of congressional legislation always depends on whether it was acting within one of its powers. Thus as far as immunity is concerned, what the Constitution gives to states with one hand it takes away with the other. Justice Brennan did distinguish the statute involved in *Hans*—the Judiciary Act of 1875—on the ground that it "merely gave effect to the grant of federal question jurisdiction under Article III, which was not self-executing."<sup>147</sup> As suggested earlier, this is not much of a distinction.<sup>148</sup> Article

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139. Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 99-499, § 101(20)(D), 100 Stat. 1613, 1615 (1986).

140. *Union Gas*, 109 S. Ct. at 2295-96 (Scalia, J., concurring in part and dissenting in part). Justice Scalia was the only member of the pro-*Hans* wing to take this position. Chief Justice Rehnquist and Justices Kennedy and O'Connor joined with Justice White who dissented on the clear statement issue. He found no specific authorization for private suits against states in the original statute. At most this language would have permitted the United States to sue. He criticized the majority for relying on a later amendment that dealt primarily with an exclusion from liability. *Id.* at 2289-94 (White, J., concurring in judgment).

141. *Id.* at 2277 (plurality opinion).

142. For a discussion of *Fitzpatrick*, see *supra* text accompanying notes 116-18.

143. *Union Gas*, 109 S. Ct. at 2282 (plurality opinion).

144. *Id.* (plurality opinion).

145. *Id.* at 2277 (plurality opinion).

146. *Id.* at 2281 (plurality opinion).

147. *Id.* at 2283 (plurality opinion).



III requires congressional action to put a federal structure into place, just as every other grant of power does.<sup>149</sup> Justice Brennan also recognized principles of clear statement as a form of limit on congressional power to abrogate.<sup>150</sup> Still, his opinion is a nice illustration of how abrogation theory can render *Hans* a practical nullity. The four conservative justices who dissented did not miss this point. As Justice Scalia put it, the plurality used abrogation theory "to fight the *Hans* . . . battle all over again—but this time to win it—on the field of the Commerce Clause."<sup>151</sup> Justice Scalia would have allowed Congress to abrogate only when it is exercising its powers under the fourteenth amendment. Even Justice White, who provided the crucial fifth vote on abrogation under article I, stated that he disagreed with much of Justice Brennan's opinion, although he offered no specifics.<sup>152</sup>

It is hard to see *Union Gas* as the clear resolution that many had sought. *Hans* is alive and well, except that it contains the proverbial hole through which one can drive a truck. Justice Scalia is probably right that the battle over article I abrogation will be fought again,<sup>153</sup> especially given Justice White's apparent reservations. How clear Congress must be to set aside state immunity also will continue to divide the Court, as it did in five cases during the last term alone.<sup>154</sup> Perhaps most intriguing is whether the Court will recast the eleventh amendment debate in subconstitutional terms. To do so would remove a number of obstacles currently blocking the path to clear analysis. It also would force the Court to admit the extent to which *Hans* has been cast aside.

#### IV. ELEVENTH AMENDMENT DOCTRINE POST-*UNION GAS*— THREE PROBLEMS

The previous statement may seem surprising. After all, in *Union Gas* the whole Court purported to accept *Hans*.<sup>155</sup> However, it seems clear that the Brennan wing's preference remains to overrule it.<sup>156</sup> Short of that, they will use the *Hans* framework when they can to subject states to suit in federal court. The

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148. See *supra* text accompanying notes 96-97.

149. Strictly speaking, Justice Brennan's opinion is largely limited to congressional power under the commerce clause, as opposed to a general discussion of other article I powers. For example, he discusses that clause's ability to "displace state authority even where Congress has chosen not to act." *Union Gas*, 109 S. Ct. at 2284 (plurality opinion). However, he does cite lower court cases upholding abrogation under other powers, and most of his analysis is applicable to the general article I context.

150. *Union Gas*, 109 S. Ct. at 2277 (plurality opinion).

151. *Id.* at 2303 (Scalia, J., concurring in part and dissenting in part).

152. *Id.* at 2295 (White, J., concurring in judgment).

153. *Id.* at 2303 (Scalia, J., concurring in part and dissenting in part). He stated that reaching the result in *Union Gas* through abrogation analysis "is an unstable victory . . . since that principle is too much at war with itself to endure. We shall either overrule *Hans* in form as well as in fact, or return to its genuine meaning." *Id.* (Scalia, J., concurring in part and dissenting in part).

154. See *supra* note 27.

155. A possible exception to this statement is Justice Stevens. Although he concurred in Justice Brennan's plurality opinion, he insisted that post-*Hans* limitations on suits against states can be overridden by Congress because they represent judge-made law only, not because of anything in the Constitution. *Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring).

156. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2403 (1989) (Brennan, J., dissenting).

one thing the whole Court does agree on is abrogation theory, although there is disagreement as to how far it goes. Abrogation theory then might be the building block of a compromise position: a midpoint between *Hans* and giving the states nothing at all. Looking at the matter this way poses three doctrinal problems.

#### A. Immunity as Subconstitutional

The starting point is whether the eleventh amendment can be recast as real, but as less than constitutional, in status. Justice Stevens took this step in an insightful concurring opinion in *Union Gas*.<sup>157</sup> He distinguished the class of cases covered by the literal text of the eleventh amendment from "the defense of sovereign immunity that the Court has added to the text of the amendment in cases like *Hans*."<sup>158</sup> The latter cases represent a judge-made doctrine designed to further interests of federal-state comity.<sup>159</sup> This body of law is like that which has grown up under *Younger v. Harris*.<sup>160</sup> As such, it is reversible by Congress.

The pro-*Hans* majority never has conceded any of this. It insists that current eleventh amendment principles flow from the Constitution. Yet it never has explained the paradox of abrogation adequately, except in the limited context of *Fitzpatrick*.<sup>161</sup> There is precedent for Justice Stevens' approach in other areas. Besides *Younger*, one might cite the extensive body of fourth amendment exclusionary jurisprudence.<sup>162</sup> The Court repeatedly describes these cases as resting on judge-made rules thought to further fourth amendment goals.<sup>163</sup> Perhaps the current body of eleventh amendment doctrine is an example of what Professor Monaghan calls "constitutional common law."<sup>164</sup> Monaghan posits the existence of "a substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress."<sup>165</sup> Monaghan's thesis is not without its problems.<sup>166</sup> How, for example, does one tell whether a particular rule is of this sort when the Court has not indicated one way or another? The fact that Congress seeks to overturn it cannot be determinative. That would turn "constitutional common law" into a circular self-fulfilling promise. In addition, there is the nagging question whether Congress in overturning a subconstitutional rule must replace it with something adequate to protect the interests involved. Still,

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157. *Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring).

158. *Id.* (Stevens, J., concurring).

159. *Id.* at 2287-88 (Stevens, J., concurring).

160. 401 U.S. 37 (1971).

161. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976).

162. *E.g.*, *United States v. Calandra*, 414 U.S. 338 (1974).

163. *E.g.*, *id.* at 348.

164. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

165. *Id.* at 2-3.

166. *See, e.g.*, Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978).

Monaghan's thesis has general appeal and appears to fit the eleventh amendment context nicely. It explains the source of the extant rules and justifies congressional abrogation of them.

Several revisionist scholars have reached somewhat similar results, at least to the extent of directing the search away from the eleventh amendment as a constitutional imperative.<sup>167</sup> Their premise is that the *Hans* result is not altogether untenable; it reflects a legitimate concern for the federal-state balance, a concern that the federal "remedial structure not intrude unduly on the performance of other branches and levels of government."<sup>168</sup> One commentator views state immunity as an example of a broad-ranging, tenth amendment-based principle of state sovereignty.<sup>169</sup> In the post-*Garcia* world,<sup>170</sup> this seems an unpromising avenue from the point of view of the states. That case renders suspect any notion of state sovereignty with teeth.<sup>171</sup> Another critic of the *Hans* rationale regards article III as "inviting because of its ambiguity," and "superior to the eleventh amendment as an arena for accommodating countervailing concerns of federal law enforcement and state sovereignty."<sup>172</sup> To propose this avenue for reconstructing state immunity is to invite the Court to engage in the same extratextual analysis that has engendered such intense criticism of present doctrine. It also fails to provide an immediate answer to questions of congressional power.

The most complete statement of an alternative, subconstitutional foundation is Professor Jackson's advocacy of a form of state sovereignty as a principle of federal common law.<sup>173</sup> She sees this law as generated by background understandings about the roles of the two sovereigns<sup>174</sup> and authorized by the grant to the federal courts of the "judicial power."<sup>175</sup> That power includes a substantial degree of choice over matters of remedies and forum allocation.<sup>176</sup> This sounds like the Monaghan thesis, although Professor Jackson insists that the eleventh amendment is not a source of the relevant understandings.<sup>177</sup> Because the amendment is the only part of the Constitution that directly addresses suits against states in federal court, this author's inclination is to view it as the primary source for any recast, subconstitutional body of post-*Hans* doctrine.

As Professor Jackson points out, a subconstitutional approach might leave

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167. See authorities cited *supra* note 77.

168. Jackson, *supra* note 7, at 82.

169. Massey, *supra* note 7.

170. See *supra* note 68.

171. See Brown, *supra* note 28, at 376-79.

172. Shreve, *supra* note 41, at 613. It should be noted that this is only a tentative suggestion. Professor Shreve's main goal is to shift the state sovereignty inquiry away from the eleventh amendment.

173. As Professor Jackson notes, Professor Field's earlier work puts forward a somewhat similar view. See Jackson, *supra* note 7, at 72 n.297. Without intending to minimize the earlier writings of critics such as Professor Field, I have focused on revisionist articles that have appeared since 1980.

174. *Id.* at 76.

175. *Id.* at 84-87.

176. *Id.* at 82-104.

177. *Id.* at 75.

present outcomes in more or less their present forms.<sup>178</sup> Pure revisionists would object that states do not even deserve this. More to the point, states can argue that their interests are even further weakened by removing the current “constitutional” cloak. This argument has force, but it should not obscure the point that the real blow to state immunity is the Court’s own acceptance of abrogation theory. Whether current doctrine remains precariously grounded in the Constitution—the upshot of *Union Gas*—or is recast as a subconstitutional matter, the issue of possible limits on congressional power to abrogate will continue to dominate the eleventh amendment debate.

*B. The Nature of the Congressional Power Utilized as a Source of Limits*

*Union Gas* does stand for the proposition that Congress’ ability to abrogate the states’ immunity is the same under the article I commerce power as it is under the fourteenth amendment, but this resolution may not be the last word on the issue. It remains a post-*Union Gas* problem. The four justices who dissented on that issue want to relitigate it. Justice White’s fifth vote did not rest on the plurality’s rationale. The main reason for thinking that a majority may yet emerge that distinguishes between article I power and fourteenth amendment power is that without such a distinction very little is left of *Hans*. The case for drawing the distinction is strengthened as long as the Court continues to treat the states’ immunity as flowing from the Constitution. Something else in the Constitution must serve as the source of power to abrogate that immunity.

The fourteenth amendment is different from the other relevant parts of the Constitution in two respects.<sup>179</sup> It came after both the eleventh amendment and article III.<sup>180</sup> Thus the states in the fourteenth amendment may have consented to a range of congressional powers over them that is different from the powers to which they consented in the original constitutional plan. If it is the eleventh amendment that gave the states immunity, they could have consented to the removal of that immunity in the fourteenth amendment context while retaining it as far as the earlier granted powers are concerned. *Fitzpatrick* rests on a second important difference: the fourteenth amendment was passed to ensure national power over the operations of state governments.<sup>181</sup> Thus it contemplated inroads on their sovereignty including federal court enforcement of national regulations.

As Justice Brennan pointed out in *Union Gas*, the timing argument is weakened somewhat by the pro-*Hans* justices’ consistent treatment of the eleventh amendment as essentially resting on an understanding of state immunity which pre-dated the original Constitution and was part of it.<sup>182</sup> The emphasis is not on

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178. *Id.* at 67.

179. See generally Jablonski, *The Eleventh Amendment: An Affirmative Limitation on the Commerce Clause Power of Congress—A Doctrinal Foundation*, 37 DE PAUL L. REV. 547 (1988). Perhaps more than any other writer Mr. Jablonski has analyzed the arguments for power-based limits on abrogation and supports such limits.

180. See Brown, *supra* note 28, at 384 n.188.

181. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976).

182. *Union Gas*, 109 S. Ct. at 2283 (plurality opinion).

the fact that the eleventh amendment came later. The Court has focused on the intent of the framers of the Constitution, not the amendment, and treated the latter as the restoration of an understanding misunderstood in *Chisholm*.<sup>183</sup> For Justice Brennan, all granted powers are exercised in light of the Constitution's background. Thus if Congress can abrogate under one power, as unanimously held in *Fitzpatrick*, it can abrogate under all.<sup>184</sup>

Still, one can find plenty of references by the Court to the eleventh amendment as the source of immunity doctrine.<sup>185</sup> Perhaps the eleventh was an anti-federalist victory designed to alter balances in the original Constitution.<sup>186</sup> Thus it trumps what is contained in article I, and, in turn, might be trumped by the fourteenth amendment. Indeed, it may not matter whether immunity comes from article III or the eleventh amendment. The fourteenth postdates both. The text of the eleventh, however, tied to article III of the original Constitution, becomes crucial. The message, as broadened by *Hans*, is a general interdiction of federal court suits against states. Unless countered by some other provision, that interdiction applies to Congress in the exercise of any of its powers whether the legislation is "necessary and proper"<sup>187</sup> to implement article I or "appropriate"<sup>188</sup> to implement the fourteenth amendment. The question becomes whether the latter differs from the former in more than chronology.

Dissenting in *Union Gas*, Justice Scalia relied primarily on the notion that the fourteenth amendment is qualitatively different from article I, in that it is aimed squarely at sovereignty.<sup>189</sup> This seems the stronger argument for a power-based distinction as well as a more faithful reading of *Fitzpatrick*.<sup>190</sup> Article I powers affect state sovereignty indirectly by giving Congress the potential authority to displace states in some fields.<sup>191</sup> The fourteenth amendment is aimed directly at how the states run their governments, both procedurally and substantively.<sup>192</sup> Drawing this distinction however, smacks of *National League*

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183. *E.g.*, *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 480-85 (1987) (plurality opinion).

184. *Union Gas*, 109 S. Ct. at 2283 (plurality opinion).

185. *E.g.*, *Welch*, 483 U.S. at 488-90 (plurality opinion).

186. *See* Marshall, *supra* note 43, at 1388.

187. The last clause of article I, § 8 states that the Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

188. "The Congress shall have power to enforce, by appropriate legislation, the provision of this article." U.S. CONST. amend. XIV.

189. *Union Gas*, 109 S. Ct. at 2302 (Scalia, J., concurring in part and dissenting in part). His text suggests a historical argument—he describes the fourteenth amendment as "later" than the eleventh, and also distinguishes the original Constitution from "provisions adopted subsequently"—but he does not elaborate on it. *Id.* (Scalia, J., concurring in part and dissenting in part) (emphasis added).

190. *See supra* text accompanying notes 116-18. *Contra* L. TRIBE, *supra* note 78, at 185-86.

191. It is true that as with negative commerce clause doctrine the mere conferral may displace the states without exercise. *See Union Gas*, 109 S. Ct. at 2284 (plurality opinion).

192. U.S. CONST. amend. XIV. The primary guarantees are substantive. The amendment forbids outcomes that abridge privileges and immunities of United States citizens, deprive persons of life, liberty or property without due process of law, or which deny persons the equal protection of the laws. *Id.* amend. XIV, § 1. However, sections 2 and 3 are aimed at state denials of suffrage and at

of *Cities v. Utery*,<sup>193</sup> which suggested that because of limitations derived from notions of state sovereignty Congress had greater powers vis-à-vis the states under the fourteenth amendment than under other powers.<sup>194</sup> *Garcia v. San Antonio Metropolitan Transit Authority* overruled *National League of Cities* on this very point.<sup>195</sup> Moreover, even the *National League of Cities* Court admitted that Congress could use the commerce clause to regulate "the States as States."<sup>196</sup>

Although the qualitative difference argument is stronger than the timing argument for distinguishing between article I and the fourteenth amendment, ultimately it is unsatisfactory. As Justice Brennan noted in *Union Gas*, any attempt to treat some congressional powers as more "plenary" than others is fraught with difficulties.<sup>197</sup> Thus the doctrine of *Katzenbach v. Morgan*<sup>198</sup>—that Congress can utilize the fourteenth amendment to expand constitutional guarantees—has proved problematic at best.<sup>199</sup> Similarly, whether Congress' power over the District of Columbia is superplenary has been a difficult question for the Court.<sup>200</sup> Justice Brennan's own attempt in *Union Gas* to distinguish the power to create courts from other powers is hard to accept.<sup>201</sup> The broad message of *Garcia* is a negation of attempts to distinguish among powers. Because *Garcia* dealt with state sovereignty, its message is especially applicable to the immunity debate.<sup>202</sup>

A further weakness of the fourteenth amendment argument is that the provision says nothing about departing from article III. If *Fitzpatrick* is correct that Congress can abrogate under the fourteenth there is a good case to be made that its other powers permit the same action.<sup>203</sup> The fourteenth amendment-article I distinction has proven attractive in the past,<sup>204</sup> but it probably will not prevail even if the Court continues to cast the debate in constitutional terms.

If the debate is recast in subconstitutional terms there would be even less reason to draw such a distinction.<sup>205</sup> A key premise of such a recasting would be that Congress can alter whatever federal-state balance the Court has

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office holding by those who participate in or support rebellion against the United States. *Id.* amend. XIV, §§ 2-3.

193. 426 U.S. 833 (1976).

194. *See id.* at 852 n.17.

195. *See Brown, supra* note 28, at 378.

196. *National League of Cities*, 426 U.S. at 845.

197. *Union Gas*, 109 S. Ct. at 2282 (plurality opinion).

198. 384 U.S. 641 (1966).

199. *See Monaghan, Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 9-10 (1983).

200. *See Brown, Article III as a Fundamental Value—The Demise of Northern Pipeline and its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 62 n.74 (1988).

201. Justice Scalia referred to it as "gossamer." *Union Gas*, 109 S. Ct. at 2299 (Scalia, J., concurring in part and dissenting in part).

202. *See Brown, supra* note 28, at 388-89.

203. *See Union Gas*, 109 S. Ct. at 2285-86 (plurality opinion).

204. *See Hutto v. Finney*, 437 U.S. 678, 693-95 (1978) (suggesting that Congress can authorize attorney's fees awards against states because the Civil Rights Attorney's Fee Awards Act of 1976 was passed pursuant to the fourteenth amendment).

205. *See Jackson, supra* note 7, at 108.

drawn.<sup>206</sup> Congress derives this authority not from the strength of one of its powers as opposed to another but from the nature of what it is altering as not of constitutional dimension. Thus, recasting the debate along these lines would further weaken the states' position. Indeed, it would leave them with only one set of limits: judicially developed requirements of a clear statement by Congress of its intent to abrogate state immunity.

### C. *Clear Statement Rules as a Post-Union Gas Problem—The Question of Authority*

It must be remembered that *Union Gas* was the product of two different majorities. Five justices found that Congress had the power to abrogate under the commerce clause. Another five found that it had adequately expressed its intention to do so. The more frequent pattern in eleventh amendment cases is for the states to win on the latter issue. Two 1989 decisions illustrate the point. *Hoffman v. Connecticut Department of Income Maintenance*<sup>207</sup> involved the Bankruptcy Act.<sup>208</sup> This Act provides in part that:

notwithstanding any assertion of sovereign immunity—(1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units . . . .<sup>209</sup>

The conservative justices invoked clear statement principles, in the face of this language, to block recovery by the trustee of a bankrupt's funds held by the state.<sup>210</sup> In *Dellmuth v. Muth*<sup>211</sup> the issue was suits against states under the Education of the Handicapped Act.<sup>212</sup> The Act clearly authorizes civil actions by parents unhappy with the education plan for their children.<sup>213</sup> The states' substantial role under the Act suggests that many such suits would be brought against them.<sup>214</sup> Nonetheless, the five pro-*Hans* justices ordered dismissal on eleventh amendment grounds.<sup>215</sup>

What is at work here is an extraordinarily stringent standard of statutory construction.<sup>216</sup> In *Dellmuth* the Court went so far as to suggest that any authorization of suit might have to cite the eleventh amendment specifically to

206. See *Union Gas*, 109 S. Ct. at 2286-89 (Stevens, J., concurring).

207. 109 S. Ct. 2818 (1989).

208. 11 U.S.C. §§ 101-1330 (1988).

209. 11 U.S.C. § 106(c) (1988).

210. The majority's brief opinion is a relatively rote repetition of the strictness of the standard as well as a reminder that legislative history cannot be utilized to satisfy clear statement requirements. *Hoffman*, 109 S. Ct. at 2822-24.

211. 109 S. Ct. 2397 (1989).

212. 20 U.S.C. §§ 1400-1420 (1988).

213. 20 U.S.C. § 1415(b) (1988).

214. See *Dellmuth*, 109 S. Ct. at 2403 (Brennan, J., dissenting) (describing "overarching responsibility placed upon the States").

215. *Id.* at 2400-02 (majority opinion).

216. See *id.* at 2405 (Brennan, J., dissenting) (criticizing Court for adopting "strict drafting regulations . . . ruling out resort to legislative history and apparently also barring inferential reasoning from text and structure").

abrogate state immunity.<sup>217</sup> The more general formation is that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."<sup>218</sup> The Court has rejected use of legislative history as a guide to congressional intent.<sup>219</sup> The result is that clear statement is a recurring battleground and that the states win a substantial number of victories on it.

This subsection focuses on where the Court gets the authority to impose this heightened standard on Congress. The matter would be relatively straightforward if every eleventh amendment case involved solely the question of waiver by the state of its immunity shield. The clear statement rule would ensure that the state knew what it was getting into and knew directly from the face of the most relevant federal document—the statute. This approach works in the context of grant-in-aid programs.<sup>220</sup> The state accepts the funds and attendant conditions. It does not work when Congress imposes a regulatory regime upon states that may include private damage suits to enforce federal norms. One would have to engage in the transparent fiction that the state "chose" to enter the area even if it represented a core governmental function such as the state employees' retirement fund involved in *Fitzpatrick*.<sup>221</sup> What is at work is, on the one hand, an abrogation by Congress regardless of what the states do, and, on the other, a rule of statutory construction which makes that abrogation hard to accomplish.

Is the stringent clear statement rule somehow justified by treating state immunity as derived from the Constitution? The Court often describes the immunity in this way.<sup>222</sup> The most immediate analogy is found in another constitutional context: statutes that might be read to preclude judicial review of administrative decisions involving constitutional rights.<sup>223</sup> Here the Court has imposed a standard of "clear and convincing" evidence" that Congress intended to cut off review.<sup>224</sup> The Court has hinted that these cases are relevant in the eleventh amendment context.<sup>225</sup> Yet even the administrative review cases permit recourse to legislative history and other tools of statutory construction.<sup>226</sup> More to the point, they are based on substantial doubts that Congress

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217. *Id.* at 2401 (citing 1986 amendments to Rehabilitation Act, 42 U.S.C. § 2000d-7(a)(1) (Supp. 1987), which refers to eleventh amendment in removing state immunity).

218. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

219. *See Dellmuth*, 109 S. Ct. at 2401; *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989).

220. *See Brown, supra* note 28, at 385-88 (discussing application of eleventh amendment to grant programs enacted under the spending power).

221. *See, e.g., Union Gas*, 109 S. Ct. at 2303 (Scalia, J., concurring in part and dissenting in part).

222. *E.g., Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (referring to states' "constitutional protection under the Eleventh Amendment").

223. *E.g., Johnson v. Robison*, 415 U.S. 361 (1974) (prohibition against judicial review of statute dealing with veterans' rights not extended to actions challenging the constitutionality of a statute).

224. *Id.* at 373-74.

225. The Court cited *Johnson v. Robison* and its clear statement rule in *Dellmuth v. Muth*, 109 S. Ct. 2397, 2402 (1989). *See Field, Part II, supra* note 7, at 1251-52.

226. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-73 (1986)



can cut off review in constitutional cases.<sup>227</sup> Abrogation theory rests on the notion that Congress has the power to abrogate. Ultra strict clear statement rules serve to temper this power, suggesting that state immunity is the preferred constitutional value.

A frequently cited justification for clear statement principles is that they ensure that Congress has considered states' interests. If all this means is that Congress is presumed reluctant to disturb the prevailing federal-state balance—a general presumption by the way<sup>228</sup>—then it is hard to see why normal rules of statutory construction will not provide that assurance.<sup>229</sup> Professor Tribe goes further: “the clear statement rule would . . . ensure that attempts to limit state power will be unmistakable, thereby *structuring the legislative process* to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests.”<sup>230</sup> Where does the Court get the authority to “structure” the processes of Congress? The answer must be something of constitutional dimension. This reinforces the notion that if the current eleventh amendment balance, including strict clear statement, is to be retained, *Hans* still must be viewed as imposing constitutional principles.

What would happen to clear statement under a subconstitutional approach? In that case there would be no doubt of Congress' power;<sup>231</sup> at best a presumption of doubt that it intended to exercise it would obtain.<sup>232</sup> State immunity would be an important value, but the question would be only how to discern whether Congress intended to set it aside. As Professor Jackson has noted, the clear statement rule might be rejected altogether or a less stringent “clear evidence” rule put in its place.<sup>233</sup> Either way, the states would lose a lot from the reconceptualization.

Perhaps the Monaghan thesis<sup>234</sup> operates here to justify the existing stringent rules, even if state immunity is treated as a form of constitutional common law. Monaghan suggests that the Court has a role to play after Congress has acted in this domain. The judiciary can evaluate the effectiveness of what Con-

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(Court used legislative history as confirmation of Congress' intention that judicial review of administrative action be available unless contrary intention is clearly expressed).

227. See *Bartlett v. Bowen*, 816 F.2d 695, 706 (D.C. Cir. 1987) (“a statute that would have the effect of precluding any sort of review in an independent judicial forum . . . would be flatly inconsistent with the doctrine of separation of powers implicit in our constitutional scheme”). The agency review cases also are based on the general administrative law principle that agency decisions are presumptively reviewable. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (statutory plan of Food and Drug regulations not intended to cut off judicial review).

228. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (“unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance”).

229. See, e.g., *Dellmuth v. Muth*, 109 S. Ct. 2397, 2405-06 (1989) (Brennan, J., dissenting). Normal rules of statutory construction would also seem adequate to meet the Court's concerns about expanding federal jurisdiction. Jackson, *supra* note 7, at 110-11 n.440.

230. L. TRIBE, *supra* note 78, at 187 (emphasis added).

231. See, e.g., *Union Gas*, 109 S. Ct. at 2286-89 (Stevens, J., concurring).

232. Jackson, *supra* note 7, at 112-13.

233. *Id.* at 110-11. The “clear evidence” rule would acknowledge Congress as “the primary protector of States' interests in their own sovereignty.” *Id.* at 111.

234. See *supra* text accompanying notes 164-66.

gress has put in the place of judicially created constitutional common law.<sup>235</sup> Perhaps current clear statement rules serve as a proxy for such an evaluation. The Court gives the states something—a set of difficult obstacles Congress must overcome—to compensate for the constitutional shield that the states have lost.<sup>236</sup> Defenders of state interests probably would find this argument unproved and doctrinally questionable. Thus, as with the question of power-based limits on abrogation, it is important from the state standpoint that the *Hans* framework retain its constitutional foundation.

## V. CONCLUSION

Eleventh amendment law remains as confusing and perplexing as ever. The academic assault on *Hans* has not succeeded. While the revisionists may not have won that battle, they largely have won the war for national supremacy over state immunity. Congress apparently can remove the states' shield from suit in federal court under any of its powers. Abrogation theory is the Trojan Horse that makes this possible.

Abrogation theory, however, is doctrinally unsatisfactory and generates difficult questions of its own, particularly those of power-based limits and the validity of ultra stringent clear statement rules. The Court could clear up much of the doctrinal uncertainty by recasting *Hans* in subconstitutional terms. Yet to do so would further undermine the states' position. One should not expect such a step from a federalistic Court. Nor should one welcome it if one sees merit in a compromise solution which permits substantial federal enforcement of federal norms, yet shows concern for state treasuries and the role of state courts in enforcing those norms. As long as the clear statement rule remains in force, however shaky its foundations, the states get real protection while national supremacy will ultimately prevail. The Court's presumption is that Congress cares about the states; statutes are applied accordingly. It is true that the likely result of current doctrine is a continuing parade of split decisions not just over clear statement, but also over power-based limitations and the validity of the *Hans* framework itself. This is, admittedly, conceptually untidy. Perhaps it is the best one can hope for when an immovable force meets an irresistible object, so to speak.

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235. See Monaghan, *supra* note 164, at 26 (the appropriate question to ask would be whether "the net result of the legislative change constitute[d] an 'adequate' substitute for what the Court required"). But see *id.* at 29 ("where the Court's rule is perceived to have gone too far, it can be rejected or modified by the political process without the necessity of a constitutional amendment").

236. Cf. Brown, *supra* note 28, at 394 (describing eleventh amendment rules as a form of post-*Garcia* process federalism that replaces the substantive federalism of *National League of Cities*).

